

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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KINGSWAY FINANCIAL SERVICES, INC.,	:	
	:	
Plaintiff,	:	
	:	03 Civ. 5560 (RMB) (HBP)
-against-	:	
	:	OPINION
PRICEWATERHOUSE-COOPERS LLP,	:	<u>AND ORDER</u>
<u>et al.</u> ,	:	
	:	
Defendants.	:	

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PITMAN, United States Magistrate Judge:

I. Introduction

Defendant John A. Dore (the "Movant") moves to quash the subpoena duces tecum issued by plaintiffs American Country Holdings, Inc. ("ACHI") and Kingsway Financial Services, Inc. ("Kingsway") to non-party Great American Insurance Group ("Great American"), ACHI's insurance provider. For the reasons set forth below, the motion to quash is granted in part and denied in part. Great American and Dore are to provide a log of documents withheld on the ground of privilege or work-product protection within thirty (30) days of the date of this Order.

II. Facts

Kingsway and ACHI commenced this action against Martin L. Solomon, Edwin W. Elder, William J. Barrett, Wilmer J. Thomas,

Jr., Karla Violetto ("Director Defendants"), John A. Dore, and PricewaterhouseCoopers LLP ("PWC"), alleging securities fraud, common law fraud and conspiracy in connection with Kingsway's purchase of ACHI. The plaintiffs allege that from 1999 through 2002 ("Relevant Period"), the defendants "fraudulently caused and maintained an inflated stock price of ACHI through their actions . . . ." (Plaintiff's Third Amended Complaint, dated April 28 2005, (Plf.'s Complaint) at ¶ 4). Plaintiffs' allegations are set forth in detail in an opinion issued by the Honorable Richard M. Berman, United States District Judge, Kingsway Fin. Servs., Inc. v. PricewaterhouseCoopers, LLP, et al., 420 F. Supp.2d 228 (S.D.N.Y. 2005) (granting defendants' motion to dismiss in part and denying defendants' motion to dismiss in part); familiarity with this decision is assumed. The plaintiffs have settled their claims against the Director Defendants, leaving Dore and PWC as the only defendants remaining in this action (Docket Item 291).

A. The D & O Insurance Policy

In connection with their defense of this action, the Director Defendants and John A. Dore have sought reimbursement for their legal fees, costs, and expenses both from plaintiffs, pursuant to indemnification agreements<sup>1</sup>, and from Great American

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<sup>1</sup> To date, plaintiffs have advanced a substantial portion of defendant John A. Dore's legal expenses pursuant to an April 2, (continued...)

pursuant to a directors and officers insurance policy issued to ACHI (Great American Directors', Officers', Insured Entity and Employment Practices Liability Insurance, Policy No. DOL5741496 (the "D & O Insurance Policy"), attached as Ex. D to the Morgan Decl.). The D & O Insurance Policy, which has a limit of 10 million dollars, was issued by Great American to ACHI on July 25, 1997 and expired on April, 5, 2005 (see "Declarations", attached to the D & O Insurance Policy). The section of the D & O Insurance Policy relevant to the dispute before me provides that:

A. The **Insureds** [ACHI] shall not incur Costs of Defense or admit liability, offer to settle, or agree to any settlements in connection with any **Claim** without the express prior written consent of the **Insurer** [Great American], which consent shall not be unreasonably withheld. The **Insureds** shall provide the **Insurer** with all information and particulars it may reasonably request in order to reach a decision as to such consent. Any **Loss** resulting from any admission of liability, agreement to settle, or **Costs of Defense** incurred prior to the **Insurer's** consent shall not be covered hereunder.

B. The **Insureds**, and not the **Insurer**, have the duty to defend all **Claims**, provided that the **Insureds** shall only retain counsel as is mutually agreed upon with the **Insurer**.

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<sup>1</sup>(...continued)  
2002 Indemnification Agreement (See Order of Judge Flynn of the Circuit Court of Cook County, Illinois, 03 CH 8189, dated June 27, 2005, attached as Ex. A to the Declaration of Alaina M. Morgan, Esq., dated February 1, 2008 ("Morgan Decl."); Memorandum of Law in Opposition to Def. John A. Dore's Motion for a Protective Order Regarding Plaintiffs' Subpoena to Great American Insurance Group ("Plf.'s Mem.") at 2).

C. The **Insurer** shall at all times have the right, but not the duty, to associate with the **Insureds** in the investigation, defense or settlement of any **Claim** to which coverage under this Policy may apply.

D. If a **Claim** made against any **Insured** includes both covered and uncovered matters or is made against any **Insured** and others, the **Insured** and the **Insurer** recognize that there must be an allocation between insured and uninsured **Loss**. The **Insureds** and the **Insurer** shall use their best efforts to agree upon a fair and proper allocation between insured and uninsured **Loss**.

E. The **Insurer** shall advance **Costs of Defense** prior to the final disposition of any **Claim**, provided such **Claim** is covered by the policy. Any advancement shall be on the condition that . . . .

(D & O Insurance Policy at Section VII, p. 6) (bold in original).

To date, Great American has advanced approximately 5.7 million dollars<sup>2</sup> to cover the legal fees of the Director Defendants in this action and has initiated a separate interpleader action seeking to resolve the competing demands of the Director Defendants and Dore to the 4.3 million dollars of coverage remaining under the D & O Insurance Policy (First Amended Interpleader Complaint, Docket Item 7, in Great American Insurance Co. v. Martin L. Solomon, et al., 07 Civ. 6498 (RMB), (S.D.N.Y. filed Sept. 17, 2007), ("Interpleader Action") at ¶ 20).

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<sup>2</sup>Defendant John A. Dore has also filed a small-claims action against Great American seeking reimbursement of yet unpaid attorneys' fees, costs, and expenses incurred in the defense of this action (James A. Dore v. Great American Insurance Co., 08-M1-16575). This action was dismissed on September 09, 2008 by Judge Pamela E. Hill Veal of the Illinois Circuit Court of Cook County (See Order to Dismiss, dated September 09, 2008, attached to the letter of Scott O. Reed, dated September 10, 2008).

The present discovery dispute arises out of plaintiffs' subpoena duces tecum to Great American (Notice of Subpoena ("Subpoena") dated November 8, 2007, attached as Ex. A to the Declaration of Scott Golinkin, Esq., dated November 30, 2007 ("Golinkin Decl.")). This subpoena seeks production of:

(1) Any and all documents received from any of the Defendants, or received from anyone on their behalf, including but not limited to their counsel, agents, representatives or other persons acting on behalf of Defendants.

(2) Any and all documents sent by Great American to any of the Defendants, or to anyone acting on their behalf, including but not limited to their counsel, agents, representatives or other persons acting on behalf of Defendants.

(3) Any and all claims files relating to American Country Holdings Inc.

(Subpoena: "Documents Requested"). Plaintiffs served the subpoena on Great American on November 9, 2007. Scott Golinkin, Esq., counsel for defendant John A. Dore, received the subpoena on November 16, 2007 (Golinkin Decl. at ¶ 3). The copy of the subpoena that was sent to counsel for the Director Defendants was postmarked November 13, 2007 (Golinkin Decl. at ¶ 4), four days after the service of Great American.

#### B. Procedural History

On November 30, 2007, John A. Dore moved to quash the subpoena to Great American (Docket Item 228) and on December 7, 2007, he applied for a protective Order. Plaintiffs opposed this

motion by a letter, dated December 3, 2007, (Docket Item 233) in which they argued only that I lacked jurisdiction over the motion to quash because the subpoena had been issued by the United States District Court for the Northern District of Illinois. On December 11, 2007, I determined that, pursuant to Fed.R.Civ.P. 26(c), jurisdiction was proper in this court because the action was pending here, and granted Dore's motion to quash because plaintiffs' sole argument in opposition to the motion was lack of jurisdiction (Docket Item 245). The plaintiffs appealed my December 11, 2007 Order, and on January 25, 2008 the Honorable Richard M. Berman reversed and remanded the matter to me in order to permit plaintiffs to assert additional arguments concerning Dore's application for a protective order (Docket Item 250).

### III. Analysis

Dore moves to quash the subpoena<sup>3</sup> issued by plaintiffs to Great American on the following three grounds: (1) plaintiffs have violated the prior notice requirement of Rule 45(b)(1); (2) the subpoena is "over-broad and seeks irrelevant material"; (3) the subpoena seeks documents protected by the attorney-client privilege or the work-product privilege (Defendant John A. Dore's Motion to Quash Plaintiff's Subpoena to Great American Insurance Group, dated November 30, 2007 ("Def.'s Mem.") at 3, 4, 8, 9).

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<sup>3</sup>As a threshold issue, plaintiffs contend that Dore lacks standing to challenge the subpoena because it was issued to a third party, Great American. A party generally lacks standing to quash a subpoena directed to a non-party unless the party claims some personal right or privilege with regard to the documents sought. Haywood v. Hudson, CV-90-3287 (CPS), 1993 WL 150317 at \*4 (E.D.N.Y. April 23, 1993), citing Brown v. Braddick 595 F.2d 961, 967 (5th Cir. 1979); Carey v. Berisford Metals Corp., 90 Civ. 1045 (JMC), 1991 WL 44843 at \*8 (S.D.N.Y. March 28, 1991); 9A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure §2459 n.7 at 436 (3d ed. 2008). Even if I ignore the fact that Great American has also objected to the subpoena (Letter of Peter J. Prommer, Esq., dated November 21, 2007, attached as Ex. F to the Morgan Decl.), Dore would still have standing to challenge the subpoena because he has asserted that the requested documents are privileged (Def.'s Mem. at 5-8). Dore does not have standing, however, to challenge the subpoena with respect to those documents that only reflect communications between the Director Defendants and Great American and do not include any shared attorney work product.

A. Prior Notice of the Subpoena

Dore contends that the subpoena should be quashed because plaintiffs failed to provide notice of the subpoena prior to its service as required by Fed.R.Civ.P. 45(b)(1). Rule 45(b)(1) states that: "[i]f [a] subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party." Thus, there is no question that Rule 45(b)(1) requires a party issuing a subpoena to serve "prior notice" to all of the other parties to the litigation. See, e.g., Zinter Handling, Inc. v. Gen. Elec. Co., 04-CV-500 (GLS/DRH), 2006 WL 3359317 at \*2 (N.D.N.Y. Nov. 16, 2006); Fox Indus. Inc. v. Gurovich, CV 03-5166 (TCP) (WDW), 2006 WL 2882580 at \*11 (E.D.N.Y. Oct. 6, 2006); Cootes Drive LLC v. Internet Law Library, 01 Civ. 0877 (RLC), 2002 WL 424647 at \*1 (S.D.N.Y. Mar. 19, 2002); Schweizer v. Mulvehill, 93 F. Supp.2d 376, 441 (S.D.N.Y. 2000). As the Advisory Committee notes explain, the purpose of such notice is "to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things . . . ." 1991 Advisory Committee Notes to Fed.R.Civ.P. 45(b)(1).

The evidence in the record indicates that defendant John Dore was served one day after Great American and the Direc-

tor Defendants were served approximately seven days after Great American was subpoenaed (Golinkin Decl. at ¶¶ 3, 4). Thus, the service here clearly did not comply with Rule 45's prior notice requirement. Some courts have quashed subpoenas on that basis alone. See, e.g., Murphy v. Bd. of Educ. of Rochester City Sch. Dist., 196 F.R.D. 220, 222, 226-28 (W.D.N.Y. 2000) (sanctioning the attorney for issuing 12 third-party subpoenas without giving notice to opposing counsel); Schweizer v. Mulvehill, supra, 93 F. Supp.2d at 412 (stating that a subpoena, issued without prior notice, would properly be quashed). The majority approach, however, requires that the aggrieved party demonstrate some form of prejudice resulting from the failure to provide advance notice. See, e.g., Fox Indus. Inc. v. Gurovich, supra, 2006 WL 2882580 at \*11 (denying the motion to quash because the defendants were not prejudiced by plaintiff's failure to provide prior notice); Zinter Handling, Inc. v. Gen. Elec. Co., supra, 2006 WL 3359317 at \*2 (same); Seewald v. IIS Intelligent Information Sys., Ltd., 95 CV 824 (FB), 1996 WL 612497 at \*5 (E.D.N.Y. Oct. 16, 1996) (denying motion to quash because the defendants learned about the document request prior to the third party's production of the documents and consequently had sufficient time to challenge the subpoena). Dore did not suffer any prejudice from plaintiffs' failure to comply with Rule 45(b)(1). The only argument that Dore raises in this regard is that the lack of

prior notice "could have resulted in Great American producing documents before they had an opportunity to challenge the subpoena" (Def.'s Mem. at 4). This is not a sufficient showing of prejudice to justify quashing the subpoena; Great American objected to the subpoena and Dore was able to file this motion to quash before any documents were produced.

Accordingly, plaintiffs' failure to serve the subpoena in conformity with the requirements of Fed.R.Civ.P. 45 is not a sufficient basis, by itself, to quash the subpoena.

B. Relevance of the Requested Documents

Dore also contends that the subpoena should be quashed because the documents it seeks are "irrelevant and over-broad" (Def.'s Mem. at 8).

Federal Rule of Civil Procedure 26(b)(1) governs the scope of discovery and permits discovery of materials that are relevant to "any party's claim or defense . . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1). "This obviously broad rule is liberally construed." Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1367 (2d Cir. 1991). "[T]he overriding policy is one of disclosure of relevant information in the interest of promoting the search for truth in a federal question

case." Burke v. New York City Police Dep't, 115 F.R.D. 220, 225 (S.D.N.Y. 1987); see also Condit v. Dunne, 225 F.R.D. 100, 105 (S.D.N.Y. 2004) (stating that "[a]lthough not unlimited, relevance, for purposes of discovery, is an extremely broad concept.").

"The party issuing the subpoena must demonstrate that the information sought is relevant and material to the allegations and claims at issue in the proceedings." Night Hawk Ltd. v. Briarpatch Ltd, LP, 03 Civ. 1382 (RWS), 2003 WL 23018833 at \*8 (S.D.N.Y. Dec. 23, 2003); citing Salvatore Studios Int'l v. Mako's Inc., 01 Civ. 4430 (BSJ) (DF), 2001 WL 913945 at \*1 (S.D.N.Y. Aug. 14, 2001) ("Rule 26(b)(1) of the Federal Rules of Civil Procedure restricts discovery to matters relevant to the claims and defenses of the parties. Here, the burden is on Mako's [who issued the subpoena] to demonstrate relevance."); accord Bridgeport Music Inc. v. UMG Recordings, Inc., 05 Civ. 6430 (VM) (JCF), 2007 WL 4410405 at \*2 (S.D.N.Y. Dec 17, 2007); Quotron Sys., Inc. v. Automatic Data Processing, Inc., 141 F.R.D. 37, 41 (S.D.N.Y. 1992); Culligan v. Yamaha Motor Corp., 110 F.R.D. 122, 125 (S.D.N.Y. 1986).

Nevertheless, discovery is not boundless, and a court may place limits on discovery demands that are "unreasonably cumulative or duplicative," or in cases "where the burden or expense of the proposed discovery outweighs its likely benefit .

. . ." Fed.R.Civ.P. 26(b) (2) (C) (i)-(iii). Once the party issuing the subpoena has demonstrated the relevance of the requested documents, the party seeking to quash the subpoena bears the burden of demonstrating that the subpoena is over-broad, duplicative, or unduly burdensome. Sea Tow Int'l, Inc. v. Pontin, 246 F.R.D. 421, 424 (E.D.N.Y. 2007) ("The burden of persuasion in a motion to quash a subpoena . . . is borne by the movant."), quoting Jones v. Hirschfeld, 219 F.R.D. 71, 74-75 (S.D.N.Y. 2003). The determination of whether a subpoena is unduly burdensome turns, in part, on why the requested material is relevant. United States v. Int'l Bus. Mach Corp., 83 F.R.D. 97, 104 (S.D.N.Y. 1979) (a court evaluating a motion to quash considers "such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed."); Bridgeport Music Inc. v. UMG Recordings, Inc., supra, 2007 WL 4410405 at \*2; see also Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 50 (S.D.N.Y. 1996) ("[t]o the extent a subpoena sweepingly pursues material with little apparent or likely relevance to the subject matter it runs the greater risk of being found overbroad and unreasonable.")

1. Documents & Communications  
Unrelated to this Policy

The plaintiffs seek the discovery of any and all "documents" or claims files in Great American's possession relating to ACHI or the defendants from January, 1997 to the present (Subpoena: "Definitions" and "Documents Requested"). Not only does the subpoena seek eleven years of documents but it is not even limited to the D & O policy at issue in this litigation. Instead, it seeks discovery of any prior or subsequent policies issued by Great American without indication of any relevance to this litigation.

Accordingly, the subpoena is quashed with regard to any claims files or communications between ACHI and Great American unrelated to the D & O Insurance Policy.

2. Documents & Communications  
Concerning the D & O Policy

The plaintiffs argue that the documents and communications concerning the D & O Insurance Policy are relevant because "[i]f Dore made or transmitted statements of fact to Great American (or vice versa) about the events that occurred at ACHI during the period of time relevant to the acquisition, those statements are relevant to the litigation . . . ." (Plf.'s Mem. at 10). Plaintiffs also suggest that the communications may

provide proof of defendants' scienter (Plf.'s Mem. at 10). For purposes of analyzing the parties' positions, it is helpful to separate the documents at issue into three categories: (1) those communications which occurred from 1997 to 1999; (2) those communications which occurred during the Relevant Period, i.e., from January 1, 1999 to April 1, 2002, prior to the tender offer, and (3) communications after the tender offer on April 1, 2002.

a. Documents and Communications  
from 1997 to 1999

The plaintiffs have not presented any grounds for the discovery of communications occurring prior to January 1, 1999, the beginning of the "Relevant Period" during which the defendants allegedly improperly inflated the price of ACHI stock (Plf.'s Complaint at ¶ 4, p. 3). Indeed, by definition, these documents could not contain "statements of fact . . . about the events that occurred at ACHI during the period of time relevant to the acquisition", and, could not therefore, be relevant (Plf.'s Mem. at 10).

Accordingly, Dore's motion to quash is granted with respect to any claim files or "documents" created prior to the start of the Relevant Period on January 1, 1999.

b. Documents and Communications  
from the Relevant Period

Dore next argues that the plaintiffs have failed to present any rationale for the discovery of documents generated during the Relevant Period. According to Dore, any communications with Great American prior to the April 1, 2002 tender offer should be contained within ACHI's files, which are presently in plaintiff's possession. While Great American's files for this period may not contain anything that is not already in ACHI's files, this fact alone is an insufficient ground on which to quash the subpoena. See, e.g., Burns v. Bank of America, 03 Civ. 1685 (RMB) (JCF), 2007 WL 1589437 at \*15 n.13 (S.D.N.Y. June 4, 2007) ("Even if Bank of America already possesses many of the documents in question, this is not a bar to its taking discovery in this matter."); VNA Plus, Inc. v. Apria Healthcare Group, Inc., Civ.A. 98-2138-KHV, 1999 WL 386949 at \*6 (D. Kan. June 8, 1999) ("Asking for information already within the possession of the party seeking the discovery does not of itself make the interrogatory unduly burdensome or oppressive."), citing Cook v. Rockwell Int'l Corp., 161 F.R.D. 103, 105 (D. Colo. 1995); Ft. Washington Res., Inc. v. Tannen, 153 F.R.D. 78, 79 (E.D. Pa. 1994) ("It is not a bar to the discovery of relevant material that the same material may be in the possession of the requesting party . . . ."); Federal Deposit Ins. Corp. v. Renda, 126 F.R.D.

70, 72 (D. Kan. 1989) ("Even if the plaintiffs are in possession of certain documents which they requested from the defendants, the plaintiffs are entitled to review those documents which are in the defendants' control."), aff'd, Federal Deposit Ins. Corp. v. Daily, No. 91-3035, 1992 WL 43488 at \*1 (10th Cir. Mar. 3, 1992); see also 8 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2014 (3d ed. 2008).

Dore has raised no other arguments to support his motion to quash the discovery of communications during the "Relevant Period" and therefore has failed to meet his burden of demonstrating that the discovery is duplicative, irrelevant or would subject a non-party to undue burden. Sea Tow Int'l, Inc. v. Pontin, supra, 246 F.R.D. 421, 424; Jones v. Hirschfeld, supra, 219 F.R.D. 71, 74-75.

c. Documents and Communications After  
the Tender Offer on April 1, 2002

To the extent they contain statements by a defendant concerning the subject matter of this action, communications between Dore and Great American after the tender offer of April 1, 2002 may provide some evidence of materiality or scienter. Therefore, with respect to these documents, the subpoena appears reasonably calculated to lead to the discovery of admissible evidence. Dore has presented no arguments regarding the irrelevance of these communications. In addition, Dore has not pre-

sented any evidence that discovery of these documents would be duplicative or unduly burdensome.

Accordingly the motion to quash documents from January 1, 1999 to the present, on the ground of irrelevance, is denied.

C. Application of the  
Attorney-Client Privilege  
to the Requested Documents

Dore also contends that many of the subpoenaed documents incorporate "information obtained from Dore in the course of seeking legal advice and thus production of these documents would invade the attorney-client privilege" (Def.'s Mem. at 7).

The elements of the attorney-client privilege are well-settled:

The [attorney-client] privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160

F.R.D. 437, 441 (S.D.N.Y. 1995), quoting United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). As the party asserting the privilege, Dore has the burden of estab-

lishing through affidavits or other evidentiary material the applicability of the attorney-client privilege to the document in dispute. See von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987) ("The burden is on the party claiming the protection of a privilege"); Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 470 (S.D.N.Y. 1993) (citing cases).

"An insured may communicate with its insurer for a variety of reasons, many of which have little to do with the pursuit of legal representation or the procurement of legal advice." In re Pfizer Inc. Sec. Litig., 90 Civ. 1260 (SS), 1993 WL 561125 at \*7 (S.D.N.Y. Dec. 23, 1993). Dore contends that the subpoenaed documents include "information obtained from Dore in the course of seeking legal advice", reports prepared by counsel, and recommendations for further handling of the litigation (Def.'s Mem. at 5, 6). The subpoenaed materials that include this information may indeed be privileged. See, e.g. American Special Risk Ins. Co. v. Greyhound Dial Corp., 90 Civ. 2066 (RPP), 1995 WL 442151 at \*2 (S.D.N.Y. July 26, 1995) (holding that the privilege extends to the disclosure by an insured to its insurer of "facts required to show potential liability of the insured"), citing Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508, 1515 (D.C. Cir. 1993).

1. Waiver and the Common Interest Rule

Plaintiffs contend that even if the subpoenaed documents contain or reflect privileged attorney-client communications, the privilege has been waived because Dore shared these documents with a third party, Great American (Plf.'s Mem. at 5). Dore responds that the privilege has not been waived by disclosure to Great American because Dore and Great American share a "common interest" in defending this action (Def.'s Mem. at 8).

Courts in this Circuit do recognize the "common interest rule." The common interest rule is not an independent privilege; rather, it is a limited exception to the general rule that the attorney-client privilege is waived when a protected communication is disclosed to a third party outside the attorney-client relationship. See Coregis Ins. Co. v. Lewis, Johs, Avallone, Aviles & Kaufman, LLP, 01 CV 3844 (SJ), 2006 WL 2135782 at \*15 (E.D.N.Y. July 28, 2006), citing Bruker v. City of New York, 93 Civ. 3848 (MGC) (HBP), 2002 WL 484843 at \*4 (S.D.N.Y. Mar. 29, 2002); United States v. United Tech. Corp., 979 F. Supp. 108, 111 (D. Conn. 1997); see generally United States v. Schwimmer, 892 F.2d 237, 243-44 (2d Cir. 1989). The common interest rule may also apply where multiple parties are represented by multiple counsel so long as the parties share a

common interest in a legal matter. Walsh v. Northrup Grumman Corp., 165 F.R.D. 16, 18 (E.D.N.Y. 1996); Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., supra, 160 F.R.D. at 447. Furthermore, "[t]he need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter." Capra, The Attorney-Client Privilege In Common Representations, 20 Trial Lawyers Quarterly (Summer 1989) at 21. Thus, it is not necessary that there be actual litigation in progress for the common interest rule to apply. United States v. Schwimmer, supra, 892 F.2d at 244; United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987), vacated in part on other grounds, 842 F.2d 1135 (9th Cir. 1988) (en banc), aff'd in part and vacated in part on other grounds, 491 U.S. 554 (1989). As insured and insurer, Dore and Great American appear to have had a common interest with regard to the underlying action at the time the subpoenaed communications took place. Coregis Ins. Co. v. Lewis, Johs, Avallone, Aviles and Kaufman, LLP, supra, 2006 WL 2135782 at \*15 (stating that the common interest rule "allows an insurer aligned in interest with the insured to have access to privileged communications between the insured and its counsel, without breach of the attorney-client privilege."), citing N. River Ins. Co. v. Colombia Cas. Co., 90 Civ. 9518 (MJL), 1995 WL 5792 at \*4 (S.D.N.Y. Jan. 5, 1995); see also Lectrolarm Custom Sys., Inc. v.

Pelco Sales Inc., 212 F.R.D. 567, 571-72 (E.D. Cal. 2002)

(protecting communications between an insured and his/her insurer due to the parties' common interest in the underlying lawsuit despite the fact that the insurer was proceeding under a reservation of rights).

Plaintiffs, however, argue that there can be no cognizable common interest in this case because: (1) "Great American does not have a duty to defend these individual defendants" (Plf.'s Mem. at 5) and (2) any common interest is destroyed by the fact that Dore and Great American are now adverse to one another in the Interpleader Action and in the small claims action (Plf.'s Mem. at 5). Plaintiffs' first argument is belied by the D & O Insurance Policy itself; the Policy expressly provides that "[t]he insurer shall advance Costs of Defense prior to the final disposition of any claim, provided such claim is covered by the policy" (D & O Insurance Policy, Section VII(E)). In addition, in the Interpleader Action, Great American admits that John A. Dore, Edwin W. Elder, Martin L. Solomon, William J. Barrett and Karla Violetto are all "Insured Persons" under the policy (Interpleader Complaint at ¶¶ 8-13).

Plaintiffs second argument is equally unavailing. The fact that the parties are currently adverse in a related action does not alter the fact that Dore and Great American shared a common interest at the time the communications were made. In re

United Mine Workers of Am. Employee Ben. Plans Litig., 159 F.R.D. 307, 313 (D.D.C. 1994) ("[T]he common interest rule is concerned with the relationship between the transferor and the transferee at the time that the confidential information is disclosed. The fact that the parties' interests have diverged over the course of the litigation does not necessarily negate the applicability of the common interest rule."); see also In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129, 902 F.2d 244, 249 (4th Cir. 1990) (applying the joint defense rule to documents generated before the common interest developed between the parent company and its future subsidiary and explaining that the common interest rule focuses on the circumstances at the time of the disclosure).

Generally, the determination of whether the attorney-client privilege attaches to an insured-insurer communication turns on the nature and purpose of the communication.

Certainly, where the insured communicates with the insurer for the express purpose of seeking legal advice with respect to a concrete claim, or for the purpose of aiding an insurer-provided attorney in preparing a specific legal case, the law would exalt form over substance if it were to deny application of the attorney-client privilege. However, a statement betraying neither interest in, nor pursuit of, legal counsel bears only the most attenuated nexus to the attorney-client relationship and thus does not come within the ambit of the privilege.

In re Pfizer Inc. Sec. Litig., supra, 1993 WL 561125 at \*7, quoting Linde Thomson Langworthy Kohn & Van Dyke P.C. v. Resolution Trust Corp., supra, 5 F.3d at 1515; Lectrolarm Custom

Sys., Inc. v. Pelco Sales Inc., supra, 212 F.R.D. at 571-73

(granting defendant's motion for a protective order with respect to communications between defendant and insurer relating to the claims and defenses in the underlying lawsuit but declining to find a common interest with respect to communications relating to coverage dispute between the defendant and insurer); see also Aiena v. Olsen, 194 F.R.D. 134, 135 (S.D.N.Y. 2000) (holding that communications between defendants and their insurers relating to a coverage dispute between them were not privileged and distinguishing this situation from one in which the communications were for the defense of the insured). Therefore, communications between defendants and Great American that were intended to be in furtherance of their "joint defense" remain privileged because both Great American and defendants have a common interest in successfully defending or settling<sup>4</sup> any claims in this action. These include statements for the purpose of obtaining or providing legal assistance. See American Special Risk Ins. Co. v. Greyhound Dial Corp., supra, 1995 WL 442151 at \*2 (holding that disclosures to an insurer "in pursuit of representation" remain privileged). Any communications, however,

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<sup>4</sup>Indeed, under the policy, defendants are required to "provide the Insurer with all information and particulars it may reasonably request" prior to reaching a decision regarding settlement (D & O Insurance Policy Section VII, A).

relating to the parties' ongoing dispute regarding coverage are not privileged and must be disclosed.

D. Application of the  
Work-Product Privilege  
To the Requested Documents

Dore also contends that the subpoena requires the disclosure of documents protected as attorney work-product, including "reports prepared by their counsel, containing analyses of this action, including primarily the mental impressions and legal strategy of counsel and recommendations for further handling of this litigation" (Def.'s Mem. at 5).

In contrast to the attorney-client privilege, which is intended to encourage full disclosure by the client, the work-product doctrine "is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." United States v. Adlman, 134 F.3d 1194, 1196 (2d Cir. 1998), quoting Hickman v. Taylor, 329 U.S. 495, 511 (1947). The work-product doctrine protects the ruminations by an attorney or party concerning the strategy to be followed in a litigation. In re Grand Jury Subpoena Dated Oct. 22, 2001, 282 F.3d 156, 161 (2d Cir. 2002); In re Steinhardt Partners, L.P., 9 F.3d 230, 234 (2d Cir. 1993); Feacher v. Intercontinental Hotels Group, 06-CV-0877 (TJM/DEP), 2007 WL

3104329 at \*4 (N.D.N.Y. Oct. 22, 2007).<sup>5</sup> Like the attorney-client privilege, the party asserting the protection of the work-product doctrine bears the burden of proof. In re Grand Jury Subpoena Dated Dec. 19, 1978, 599 F.2d 504, 510 (2d Cir. 1979); Garnier v. Illinois Tool Works, Inc., 04 Civ. 1825 (NGG) (KAM), 2006 WL 1211201 at \*1 (E.D.N.Y. May 4, 2006).

"[T]hree conditions must be met in order to earn work product protection. The material must (1) be a document or tangible thing, (2) that was prepared in anticipation of litigation, and (3) was prepared by or for a party, or by or for his representative." In re Grand Jury Subpoenas Dated Dec. 18, 1981 & Jan. 4, 1982, 561 F. Supp. 1247, 1257 (E.D.N.Y. 1982); accord Weinhold v. Witte Heavy Lift, Inc., 90 Civ. 2096 (PKL), 1994 WL 132392 at \*2 (S.D.N.Y. April 11, 1994); 2 Michael C. Silberberg, Edward M. Spiro, Civil Practice in the Southern District of New York, § 15.04 at 15-13 -- 15-14 (2d ed. 2003).

The Second Circuit has explained that the second element of this test does not limit the doctrine to documents prepared primarily or exclusively to assist in litigation:

The text of Rule 26(b)(3) does not limit its protection to materials prepared to assist at trial. To the

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<sup>5</sup>Although most of the cases discuss the work-product doctrine as affording counsel privacy with respect to the development of his or her strategy, the work-product doctrine also applies to documents created by a party. In re Grand Jury Subpoenas Dated Dec. 18, 1981 & Jan. 4, 1982, 561 F. Supp. 1247, 1257 (E.D.N.Y. 1982).

contrary, the text of the Rule clearly sweeps more broadly. It expressly states that work-product privilege applies not only to documents "prepared . . . for trial" but also those prepared "in anticipation of litigation." If the drafters of the Rule intended to limit its protection to documents made to assist in preparation for litigation, this would have been adequately conveyed by the phrase "prepared . . . for trial." The fact that documents prepared "in anticipation of litigation" were also included confirms that the drafters considered this to be a different, and broader category. Nothing in the Rule states or suggests that documents prepared "in anticipation of litigation" with the purpose of assisting in the making of a business decision do not fall within its scope.

United States v. Adlman, supra, 134 F.3d at 1198-99. Thus, the appropriate inquiry regarding the second element of the test is whether "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." United States v. Adlman, supra, 134 F.3d at 1202, quoting 8 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2024 at 343 (3d ed. 2008). Recognizing that documents may be created for more than one purpose, the threshold issue as to the applicability of work-product protection has been described as requiring an inquiry into "the primary motivational purpose behind the creation of the document." United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981); accord Binks Mfg. Co. v. Nat'l Presto Indus., Inc., 709 F.2d 1109, 1119 (7th Cir. 1983), quoting Janicker v. George Washington Univ., 94 F.R.D. 648, 650 (D.D.C. 1982); Barrett v.

U.S. Banknote Corp., 91 Civ. 7420, 1992 WL 367117 at \*2-3 (S.D.N.Y. July 6, 1992); Hardy v. New York News, Inc., 114 F.R.D. 633, 644 (S.D.N.Y. 1987).

1. Waiver

Plaintiffs argue, in opposition to the motion to quash the subpoena, that any work-product protection that attached to the requested documents has been waived by disclosure to Great American.

Work-product protection may be waived by voluntary disclosure to a party outside the privileged relationship. In re Steinhardt Partners, L.P., supra, 9 F.3d. at 235. Work-product protection, however, is only waived "when the disclosure is to an adversary or materially increases the likelihood of disclosure to an adversary." ECDC Envtl., L.C. v. N.Y. Marine & Gen'l Ins. Co., 96 Civ. 6033 (BSJ) (HBP), 1998 WL 614478 at \*4 (S.D.N.Y. June 4, 1998), citing In re Steinhardt Partners, L.P., supra, 9 F.3d at 234-35; In re Crazy Eddie Sec. Litig., 131 F.R.D. 374, 379 (E.D.N.Y. 1990) ("[T]he [work-product] privilege protects information 'against opposing parties, rather than against all others outside a particular confidential relationship' . . . . Counsel may therefore share work product . . . with those having similar interests in fully preparing litigation against a common adversary."). In this case, disclosure of materials to an

insurer does not waive the work-product protection because such disclosure does not "materially increase the likelihood of disclosure to an adversary." See, e.g., In re Pfizer Inc. Sec. Litig., supra, 1993 WL 561125 at \*8 (holding that "disclosure of work product by an insurer to an insured does not waive work product privilege"); see also Chaiken v. VV Publishing Corp., supra, 1994 WL 652492 at \*2.

E. Privilege Log

It is impossible at this time, however, to assess the applicability of either the attorney-client privilege or the work-product doctrine to any of the subpoenaed documents on the basis of the sweeping statement by Dore that "the subpoena requires privileged . . . matter and no exception or waiver applies" (Def.'s Mem. at 5).

A party withholding documents on the basis of the attorney client privilege or work-product protection bears the burden of producing an index of the documents being withheld.

A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must . . . describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected will enable the parties to assess the claim.

Fed.R.Civ.P. 45(d) (2) (A); see also Local Civil Rule 26.2(a) (2) (A). Neither Great American nor Dore have produced such an index.

As I explained in an earlier opinion in this matter, "[w]here a party fails to provide an index of withheld documents in a timely manner, any potentially applicable privilege is ordinarily waived." Kingsway Fian. Servs., Inc. v. Pricewaterhouse-Coopers, LLP, 03 Civ. 5560 (RMB) (HBP), 2006 WL 1295409 at \*1 (S.D.N.Y. May 10, 2006) (collecting authorities). I continue to believe that this is the better view. Although there is authority reaching a contrary result and limiting the remedy to the belated preparation of the index of withheld documents, I do not find those cases persuasive. "Limiting the remedy to the belated preparation of a privilege log effectively tells practitioners they can flout the [Federal Rules of Civil Procedure] and incur no sanction other than an Order directing compliance with the rules." PKFinans Int'l Corp. v. IBJ Schroder Leasing Corp., supra, 1996 WL 525862 at \*4. Federal Courts would quickly grind to a halt if litigants were free to ignore the requirements of the Federal Rules of Civil Procedure in the absence of an order directing them to comply with the Rules. See generally 2 Michael C. Silberberg & Edward M. Spiro, Civil Practice in the Southern District of New York § 22:12 at 22-33 (2d ed. 2004) ("[T]he cases imposing waiver appear to express the

better view of the appropriate remedy in the event a party fails to timely provide the privilege list.").

Nevertheless, there are factors present here that mitigate against this sanction. Dore is the party asserting privilege or work-product protection with respect to documents in the physical possession of Great American; with respect to this discovery dispute, he is the real party in interest. There is no evidence currently in the record establishing that Dore has copies of all of the responsive documents in Great American's possession which may be privileged or subject to work-product protection, nor is there evidence to sustain an inference that Dore even has access to Great American's files. Thus, there is no basis for concluding that Dore could have prepared an index in a timely manner if he had sought to do so.

Under these circumstances, I conclude that a finding of waiver is inappropriate because it would penalize Dore for failing to do something that it appears he was incapable of doing in timely manner. Rather, I direct that Great American, and Dore, collectively, produce an index of all documents withheld on the ground of privilege within thirty days of the date of this Order.

#### IV. Conclusion

For the aforementioned reasons, Dore's motion to quash the subpoena to Great American is granted with respect to (1) claims files and documents unrelated to D & O policy #DOL5741496 and (2) communications prior to the beginning of the Relevant Period on January 1, 1999. Dore's motion to quash with respect to all of the other communications is denied except to the extent Great American or Dore, assert the attorney-client privilege or work-product protection. Great American and Dore are to provide a log of documents withheld on the grounds of privilege or work-product protection within thirty (30) days of the date of this Order. This Order is without prejudice to plaintiffs' right to challenge any documents withheld on the grounds of privilege or work-product protection.

Dated: New York, New York  
October 2, 2008

SO ORDERED

  
HENRY PITMAN  
United States Magistrate Judge

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